

MORRIS PETERSON
Steve Morris, Bar No. 1543
Email: sm@morrislawgroup.com
Akke Levin, Bar No. 9102
Email: al@morrislawgroup.com
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 474-9400
Facsimile: (702) 474-9422

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Nevada Power Company, d/b/a
NV Energy,

Plaintiff,

vs.

COMVERGE, INC., a Delaware
corporation,

Defendant.

Case No.

**COMPLAINT FOR
DECLARATORY RELIEF**

Plaintiff Nevada Power Company (doing business since 2008 as "NV Energy") for its Complaint against Defendant Comverge, Inc. ("Comverge"), hereby alleges as follows:

NATURE OF CLAIMS

1. NV Energy seeks a declaratory judgment that certain of its activities and systems program have not infringed or otherwise violated any rights belonging to Comverge, that NV Energy has not violated any agreements, including without limitation, a Non-Disclosure Agreement between Comverge and NV Energy dated February 8, 2007 (the "NDA") (Exhibit 1), and that NV Energy does not owe Comverge for services responsive to a request for proposal ("RFP") project.

1 2. Defendant Comverge was an unsuccessful potential
2 subcontractor in an NV Energy RFP project. In connection with that RFP,
3 Comverge maintains that the parties are bound by the NDA (that arose from a
4 preexisting agreement between the parties). Comverge also claims that NV
5 Energy breached the NDA and owes Comverge money for design services. *See*
6 Exhibit 2. In addition, Comverge has sent improper "cease and desist" letters
7 ("C&D Letters") to NV Energy and several of its vendors. (*See e.g.*, Exhibits 3-4).
8 The C&D Letters do not comply with the NDA that Comverge claims applies
9 and were designed to tortiously interfere with NV Energy's valuable business
10 relationships.

11 3. NV Energy further seeks damages, attorneys' fees, costs,
12 interest, and permanent injunctive relief.

13 JURISDICTION AND VENUE

14 4. This case arises under the Federal Declaratory Judgments Act,
15 28 U.S.C. §§ 2201 and 2202.

16 5. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1332, and
17 1367. There is complete diversity of citizenship, as described in paragraphs 9
18 and 10, and the amount in controversy exceeds \$75,000, exclusive of interest and
19 costs. As discussed in more detail in paragraph 30, Comverge seeks
20 \$1,200,000.00 for various services allegedly compensable.

21 6. This Court has personal jurisdiction (specific and general)
22 over Comverge because of Comverge's: (a) contracting with and/or offering
23 licensing opportunities to NV Energy, a company known by Comverge to be
24 located in the State of Nevada; (b) soliciting business in the State of Nevada; (c)
25 doing business and maintaining offices in Nevada; (d) sending correspondence
26 and invoices to NV Energy in the State of Nevada; and (e) threatening to take
27 action if NV Energy does not comply with its demands relating to allegedly
28

1 "confidential information" that Comverge claims NV Energy retained in
2 purported violation of the NDA.

3 7. Comverge has created an actual case and controversy and a
4 reasonable apprehension of litigation by, among other things, threatening to file
5 suit against NV Energy and by sending threatening correspondence to various
6 NV Energy vendors. *See, e.g.*, Exhibits 3-4.

7 8. Venue is proper under 28 U.S.C. § 1391(b). In this case,
8 jurisdiction is not founded solely on diversity of citizenship. Therefore, under §
9 1391(b), venue is proper (1) in a judicial district where any defendant resides, if
10 all defendants reside in the same state, or (2) in a judicial district in which a
11 substantial part of the events or omissions giving rise to the claim occurred.
12 Comverge is deemed to reside in Nevada under 28 U.S.C. § 1391(c), which
13 provides that a defendant that is a corporation shall be deemed to reside in any
14 judicial district in which it is subject to personal jurisdiction at the time the action
15 is commenced. As discussed in paragraph 6 *supra*, Comverge was subject to
16 personal jurisdiction in the District of Nevada at the time this action was
17 commenced. In addition, a substantial part of the events or omissions giving rise
18 to this action occurred in the District of Nevada.

19 THE PARTIES

20 9. Plaintiff, Nevada Power Company d/b/a NV Energy, is a
21 Nevada corporation and public utility regulated by the Public Utilities
22 Commission of Nevada. NV Energy's principal place of business and
23 headquarters is located at 6226 W. Sahara Avenue, Las Vegas, Clark County,
24 Nevada. NV Energy is engaged in, *inter alia*, the generation, transmission and
25 distribution of electricity in the State of Nevada.

26 10. Defendant, Comverge, Inc. is a Delaware corporation with its
27 principal place of business located at 5390 Triangle Parkway, Suite 300, Norcross,
28 GA 30092. Comverge holds itself out as a "leading provider of intelligent energy

1 management solutions that empower utilities, commercial and industrial
 2 customers, and residential consumers to use energy in a more effective and
 3 efficient manner." (See Comverge's website, available at www.comverge.com).
 4 Comverge maintains Nevada operations, with offices at 7140 Dean Martin Drive,
 5 Las Vegas, NV, 89118-4511.

6 ALLEGATIONS COMMON TO ALL COUNTS

7 *Background – NV Energy's Advanced Service Delivery Program*

8 11. In 2008, NV Energy began developing its vision for Advanced
 9 Service Delivery ("ASD"). ASD is NV Energy's next generation Smart Grid
 10 project that is planned to enable customers to directly manage their energy use
 11 and allow for better management of energy resources statewide. Important
 12 components of ASD are new digital meters (sometimes called "smart meters")
 13 that allow for a two-way communication between consumers and NV Energy.

14 12. The ASD project is designed to give consumers the tools and
 15 technology to help them make more informed choices about their energy use --
 16 potentially saving money and helping the environment. ASD will allow
 17 consumers to view their energy usage data on a daily basis so that they can know
 18 exactly how much energy they are using over the course of the day, week, or
 19 month before they receive their bill.

20 13. NV Energy's ASD project is underway and going well. The
 21 project will be phased in over the next few years, with completion scheduled for
 22 December 2012.

23 14. A component of NV Energy's ASD project is a growing
 24 Demand Response ("DR") portfolio that includes direct load control, price-
 25 responsive load control, energy information programs, advanced consumer
 26 gateways, distributed solar energy, and energy storage.

27 15. In 2007, NV Energy implemented the Cool Share Program, a
 28 DR program that enables NV Energy to manage air conditioning use during

1 periods of high energy demand. The Cool Share Program utilizes a two-way
2 communications-enabled load control program that works with commercial and
3 residential thermostats to provide additional energy capacity and small
4 commercial peak demand reduction.

5 *ASD RFPs*

6 16. In 2008, NV Energy developed the plans for a pilot ASD
7 Program and NV Energy's attendant third-party vendor (hardware, software and
8 ancillary services) needs. Thereafter, in early 2009, NV Energy issued three sets
9 of RFPs. The three vendor RFPs were for (1) advanced metering infrastructure
10 ("AMI") (*i.e.*, the smart meters); (2) meter data management software; and (3)
11 field services. The AMI RFP contained requests for a demand response
12 management system ("DRMS").

13 17. NV Energy received responses to the RFPs in the spring of
14 2009. Vendors that responded to the AMI RFP included proposals for DRMS.
15 Although Comverge chose not respond to the AMI RFP, at least three bidders
16 submitted proposals that included sub-proposals by Comverge as a DRMS
17 subcontractor.

18 18. By May 2009, NV Energy identified the top three vendors for
19 each respective RFP group. The top three vendors responsive to the AMI RFP
20 were Sensus, Itron, and Elster Group. Each of these vendors included two
21 different DRMS proposals, and all three vendors included a DRMS proposal
22 from Comverge (*e.g.*, Sensus proposed its own DRMS solution and a Comverge
23 DRMS solution).

24 *Vendor Evaluation/Probation Period*

25 19. The NV Energy evaluation team invited the top three vendors
26 to provide demonstrations and to conduct face-to-face meetings with the NV
27 Energy ASD team. Sensus, one of the top three AMI vendors, demonstrated its
28 own DRMS solution, but also invited Comverge to demonstrate its DRMS

1 solution on behalf of the vendor. During this meeting, Comverge did not invoke
2 any of the protections under the NDA. Indeed, before, during and after this
3 demonstration, Comverge did not provide notice that it considered its
4 presentation to be "Confidential."

5 20. In June 2009, several NV Energy DR team members visited
6 Comverge's development office in Denver, Colorado to become more familiar
7 with Comverge's DRMS product. No documents were given to NV Energy
8 during this visit and again, no documents or information designated as
9 "Confidential" were presented or provided before, during or after the meeting.

10 21. During the course of the evaluation phase, it became clear that
11 United States Department of Energy ("DOE") grant money might be available to
12 fund the ASD project. The DOE grant money would enable NV Energy to
13 expand beyond a pilot program and potentially appreciably escalate the benefits
14 available to NV Energy's customers. The DOE grant application required,
15 among other things, that NV Energy list the names of its partners and provide
16 commitments from its partners that they could fulfill NV Energy's requirements.
17 The grant application was due in August 2009. Accordingly, NV Energy
18 identified feasible ASD partners, although still in the evaluation phase.

19 22. After further evaluation by NV Energy, Sensus was identified
20 as the top AMI vendor. Work would be needed, however, to ensure that Sensus
21 and the various vendors that would be required to work with it and NV Energy
22 could be synergized with the various interested NV Energy business groups (e.g.,
23 forecasting, procurement, customer relations, and demand reduction).

24 23. As such, NV Energy contacted each of the vendors, including
25 Comverge as a subcontract to Sensus, and announced that they would be placed
26 on a 90-day "probation" period while NV Energy conducted further evaluation
27 and information gathering before finalizing any commitments with vendors. As
28 the name of the "probation" period implies, this was solely for the purpose of

1 further evaluation by NV Energy. NV Energy advised each of the potential
2 vendors that no commitments or contracts were in place during the probationary
3 period. All of the potential vendors, including Converge, were told that
4 although they were at the table as a lead potential vendor for some component of
5 the ASD Program, there was no guarantee that they would remain in that
6 position at the end of the probationary period.

7 24. NV Energy also made clear the importance of a transparent
8 "team" mentality during the evaluation phase. NV Energy told the potential
9 vendors that although they were competitors, they were teaming together to help
10 NV Energy with its ASD solution. No potential vendor, including Converge,
11 objected to this or any other ground rule associated with the probationary
12 period.

13 25. Further meetings and demonstrations were held with the
14 vendors during the probationary period. During this time, Converge, as
15 subcontractor for Sensus, made additional demonstrations to NV Energy about
16 its DRMS product. At one such presentation, Converge made a PowerPoint
17 presentation and provided NV Energy with a hardcopy. Just under one-half (7
18 of the 13 pages) were marked "Confidential & Proprietary. Do Not Disclose."
19 Other than the few slides in this presentation, NV Energy is currently unaware of
20 any other discussions of confidentiality, or efforts by Converge to identify
21 information as confidential, during the ASD process. Despite repeated requests
22 by NV Energy, Converge has failed to identify with specificity any such
23 additional information.

24 *Converge Does Not Fare Well in the Evaluation Phase*

25 26. During and after the probationary period, NV Energy
26 developed concerns that Converge's DRMS product was not sufficient to meet
27 NV Energy's DRMS requirements. At least one factor in the analysis of
28 Converge's abilities was NV Energy's previous, at times problematic, experience

1 with Comverge under a May 2008 Delivered Demand Reduction Agreement
2 ("DDR Agreement"), under which Comverge provided services for the Cool
3 Share Program.

4 27. Even though Comverge was removed from continued
5 discussions as a subcontractor under the Sensus proposal, it remained an NV
6 Energy vendor under the DDR Agreement. Comverge was also allowed to
7 continue to attempt to persuade NV Energy concerning its DRMS capabilities. In
8 fact, in December 2009, NV Energy issued a new DRMS RFP to provide
9 alternative options. Comverge submitted a response.

10 28. At the same time that NV Energy was evaluating the
11 responses to the new DRMS RFP, including Comverge's, Comverge and NV
12 Energy were in the process of negotiating an extension of the DDR Agreement.
13 Comverge proposed an amendment to the DDR Agreement that included its
14 DRMS product on a trial basis. Ultimately, the parties extended the DDR
15 Agreement, but did not include Comverge's DRMS product within its scope.

16 29. Meanwhile, NV Energy concluded its evaluation of the
17 responses to the DRMS RFPs. Comverge finished in the top three vendors, but
18 did not win the work.

19 *Comverge Demands/Threats*

20 30. On July 22, 2010, Comverge improperly invoiced NV Energy
21 \$1,200,000.00 for various services allegedly in "support of ASD Solution
22 Design/Requirements." See Exhibit 2. The invoice did not reference a contract
23 under which said "services" were purportedly invoiced. *Id.* Comverge repeated
24 its demands to collect for this invoice during October and November of 2010.
25 NV Energy never agreed to pay for such services and does not owe Comverge
26 for its efforts to prevail as a subcontractor for Sensus.

27 31. During October and November, 2010, Comverge also claimed
28 that it gave NV Energy "confidential" information during the ASD process. In

1 addition, Comverge alleged that NV Energy improperly used and/or
2 disseminated such information to third-parties and threatened potential legal
3 action against NV Energy. Despite NV Energy's request, Comverge was unable
4 to identify, with any specificity, the "confidential" information about which it
5 was complaining.

6 32. On November 18, 2010, Comverge sent the C&D Letter to NV
7 Energy attached hereto as Exhibit 3. The C&D Letter purports to put NV Energy
8 on notice of certain unspecified Confidential Information allegedly provided by
9 Comverge to NV Energy from July 2009 through April 2010 under the NDA. The
10 C&D Letter includes as three "bullet points" a description of information
11 Comverge now claims as "confidential" under the NDA. The bullet-pointed
12 description of confidential information appears nowhere in the NDA. Indeed,
13 the description of "trade secrets" and "confidential information" embraces broad
14 swathes of information including unspecified "software systems," "user
15 functionality," "business information systems," and "theories."

16 33. Comverge excluded from the C&D Letter the key requirement
17 for "confidential treatment" under the NDA: the marking requirement. The NDA
18 requires that "[a]ll documents to be treated as Confidential Information will be
19 marked 'Confidential' and all orally or visually disclosed Confidential
20 Information will be summarized in writing and delivered to the receiving Party
21 within 30 days of its disclosure." Nevertheless, as of the date of filing this
22 Complaint, NV Energy has located and returned to Comverge the only such
23 "Confidential" document that it has located.

24 34. In addition to the C&D Letter sent to NV Energy, NV Energy
25 understands that Comverge has sent similar C&D Letters to a number of NV
26 Energy's vendors. *See, e.g.*, Exhibit 4. Those C&D Letters give the false
27 impression that the "bullet-pointed" description of confidential information is the
28 same definition of confidential in the NDA, and allege that NV Energy obtained

1 "trade secrets" and "confidential business information" from Comverge that NV
2 Energy was prohibited from disclosing under the terms of the NDA. Comverge
3 fails to mention its marking requirement obligations in the C&D Letters. These
4 inaccuracies and omissions are plainly intended to interfere with NV Energy's
5 valuable business relationships.

6 35. Comverge did not comply with the NDA it purports to invoke
7 in the C&D Letters (assuming the NDA even applies). Comverge also has
8 embarked on a course designed to harm NV Energy by interfering with the
9 business relationships between NV Energy and its vendors.

10 **FIRST CLAIM FOR RELIEF**
11 **DECLARATION AS TO RIGHTS PURSUANT TO 28 U.S.C. § 2201**

12 36. Comverge's improper threats and demands against NV
13 Energy and its vendors have created a reasonable belief that Comverge will file
14 legal action against NV Energy and that such litigation will adversely affect NV
15 Energy and its programs. NV Energy's programs, including, without limitation,
16 its DR Programs, are extremely important to NV Energy, its customers,
17 shareholders, and the State of Nevada as a whole.

18 37. Unless prevented by this Court, Comverge will continue to so
19 affect NV Energy, the substantial investment it has made in its programs and NV
20 Energy's customers' confidence. NV Energy's programs are essential to NV
21 Energy's resource and efficiency plans that will inure to the substantial benefit of
22 Nevada customers and NV Energy shareholders.

23 38. To resolve the legal and factual questions raised by Comverge
24 and to afford relief from the uncertainty and controversy that Comverge has
25 created through its demands and threats against NV Energy, NV Energy is
26 entitled to a declaratory judgment of its rights under 28 U.S.C. §§ 2201-02.

27 39. NV Energy seeks a judicial declaration that it has a continued
28 right to use the information in its possession and custody without interference or

1 harassment by Comverge, and/or without any obligation or liability to
2 Comverge under the NDA. NV Energy seeks a judicial declaration that it is not
3 in violation of any rights Comverge may have or might pursue pursuant to the
4 NDA and that it does not owe to Comverge the amounts improperly invoiced for
5 design services (Exhibit 2).

6 40. In addition, NV Energy seeks reimbursement from Comverge
7 of its attorneys' fees, costs, and interest associated with bringing this action.

8 **SECOND CLAIM FOR RELIEF**
9 **INJUNCTIVE RELIEF**

10 41. NV Energy is entitled to a permanent injunction (1)
11 prohibiting Comverge from sending correspondence or otherwise
12 communicating false and/or misleading descriptions of the NDA to NV Energy
13 vendors in the future, and (2) prohibiting further damage to NV Energy and its
14 business relationships by requiring that Comverge retract all such false and/or
15 misleading statements and correspondence that it has previously issued.

16 42. The C&D Letters Comverge issued to NV Energy's vendors
17 are false and/or misleading.

18 43. NV Energy's right to operate its business constitutes a
19 property right. Comverge's unjustified interference with that right through
20 issuance of the C&D Letters to NV Energy's vendors violated that right, and has
21 done irreparable harm to NV Energy. Comverge's C&D Letters were plainly
22 intended to interfere with NV Energy's valuable business relationships with its
23 vendors through delaying or altogether precluding NV Energy from partnering
24 with those vendors to further develop energy programs. In addition, the C&D
25 Letters violate NV Energy's right to operate its business free from unjustified
26 obstruction because they directed false and/or misleading information regarding
27 NV Energy to its vendors.

28

45. Equity requires that the Court issue the permanent injunction requested by NV Energy because it is essential to preserve NV Energy's business interests and to prevent Comverge from publishing false information regarding NV Energy.

WHEREFORE, NV Energy respectfully requests that the Court grant the following relief:

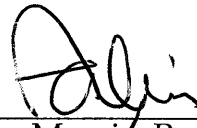
(2) a declaration that NV Energy's use of any such information is lawful and does not infringe upon any rights, contractual or otherwise, of Comverge;

(4) a permanent injunction prohibiting Comverge from (1) disseminating false and/or misleading information regarding NV Energy and the NDA and (2) prohibiting further damage to Comverge and its business relationships by requiring that Comverge retract all false and/or misleading statements and correspondence that it has previously issued regarding NV Energy;

- 1 (5) an award of interest, costs, and attorneys' fees incurred by NV
2 Energy; and
3 (6) any further relief to which it may be entitled.
4

5 Respectfully Submitted,

6 MORRIS PETERSON

7
8 By 
9 Steve Morris, Bar No. 1543
10 Akke Levin, Bar No. 9102
11 900 Bank of America Plaza
12 300 South Fourth Street
13 Las Vegas, NV 89101

14 Attorneys for Plaintiff

15 **OF COUNSEL:**

16 J. Russell Campbell
17 Will Hill Tankersley, Jr.
18 J. Eric Getty
19 BALCH & BINGHAM LLP
20 Post Office Box 306
21 Birmingham, Alabama 35201
22 (205) 251-8100
23 rcampbell@balch.com
24 wtankers@balch.com
25 egetty@balch.com
26
27
28